United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

8-5-75

75-7243

In The
UNITED STATES COURT OF APPEALS
For the Second Circuit

Docket No. 75-7243

CLIFFORD J. ARNOLD,

Plaintiff-Appellee,

-against-

DONALD M. AGEN and VICTOR CERAMI,

Defendants-Appellants.

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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Additional Cases Cited

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I

DEFENDANTS' PEACE OFFICER STATUS

The appellee asserts that the source of defendants' official status is former section 355(2)(m) of the Education Law (effective 9/1/53), which established one classification of campus "special policemen" and gave them specific jurisdiction to "one mile beyond" the campus.

However, defendants were appointed to their positions pursuant to amended section 355(2)(m) (effective 5/24/72, L. 1972, ch. 383) which clearly classified the defendants as peace officers "who shall have the power of police officers as defined in the Criminal Procedure Law."

The "special policemen" created under the former statute required no special training, and it was felt, after the campus disturbances of the late 60's and because of the general increase in crime and drug abuse affecting college campuses as well as all other areas in the nation, and due to increased enrollments, that the quality as well as the status of campus police forces should be upgraded.

In accomplishing this however, consideration had to be given to certain union contracts and vested civil service rights held by the then existent "special policemen." The resolution, then, was the creation of two classes of campus security officers, one to accommodate those formerly employed as "special policemen" (who were to be gradually phased out by attrition), and another to establish full peace officer status for campus police. The "one mile beyond" jurisdiction was eliminated for the security officers. It was not necessary to legislate additional jurisdiction for the peace officers, since their authority was automatically statewide pursuant to the provisions of the Criminal Procedure Law.

This is apparent from the training requirements demanded of those who become peace officers, as distinguished from security officers; from the fact that peace officers take a sworn oath, whereas security officers do not; and from the specific wording of section 355(2)(m) giving peace officers,

but not security officers, the power of police officers as defined in the Criminal Procedure Law. Peace officers are equipped with a nightstick or baton, while security officers are not.

Security officers were given specific authority to issue a traffic summons only on campus in section 355(2)(m). Peace officers, who could issue a traffic summons on any public thoroughfare pursuant to the Vehicle and Traffic Law, required special authorization to issue such traffic informations on campus because the campus was technically private property. Such authority however, was distinguished from that of security officers by being separately legislated in Education Law, § 362.

Appellee's citation of a 1971 Op. Atty. Gen., reproduced in his appendix at page A-1, is not applicable to the instant situation, since that opinion refers solely to former section 355(2)(m), "special policemen", and not to the current classification pursuant to the 1972 Amendments.

If the arrest underlying this civil action, had been effected by mere security officers, appellee's contentions would be correct. However, the instant claim arose out of actions performed by peace officers, whose geographic authority encompasses the entire state.

The mere fact that legislation has been introduced to definitively clarify defendants' peace officer status, does not lessen a status already attained. That the legislation was not acted upon is as attributable to the conclusion that such power is already vested, rendering the proposed legislation redundant, as it is to any contrary conclusion. The proposed legislation, as a matter of fact, has not been introduced at the request of the Education Department, nor sponsored by it, but was proposed at the request of the Civil Service Employees Association (which is even further curious, since the defendants are represented by Council 60, AFSCME and do not belong to C.S.E.A.).

There is no compelling reason or legal requirement to limit those designated as peace officers to those enumerated in Criminal Procedure Law, § 1.20. The Legislature can, and did, exercise its authority to designate peace officers in any section of any statute (People v. Wesley, 80 Misc. 2d 1002). Section 355(2)(m) of the Education Law therefore very clearly classifies defendants as peace officers and incorporates the Criminal Procedure Law in enumerating their powers, which are to be "the powers of police officers." And the Criminal Procedure Law also clearly establishes that the powers of police officers and peace officers are statewide (CPL, §§ 140.10[3] and 140.25[3]).

By the same reasoning, Officer Cerami was not guilty of violating the Penal Law in carrying a blackjack.

II

APPELLEE CANNOT ASSERT LACK OF JURISDICTION

The appellee herein cannot contest the validity of the original arrest of Richard Tarquinio. Tarquinio admittedly committed the initial violation, pled guilty to his summons and paid a fine. There was no appeal, so any defense belonging to Tarquinio as to the arresting officer's jurisdiction is waived, and Tarquinio's guilt is the law of the case. The authority of the officer to issue the summons to Tarquinio cannot be raised by Arnold, the appellee. Being thus precluded from asserting that Officer Agen had no authority to issue Tarquinio a summons in the first place, and being likewise bound by Tarquinio's plea of guilty, the fact then remains that the appellee, Arnold, did interfere with a uniformed police officer in the performance of his duties.

III

DAMAGES

A. Damages Should Have Been Separately Stated

Compensatory damages should have been separately assessed against each defendant for the separate torts asserted against them. Officer Agen had nothing to do with the alleged assault.

There was no evidence of any maliciousness in his conduct to justify an award of punitive damages. Officer Agen arrested the appellee, and filed the charges against him. There is no evidence that he was carrying a blackjack, and, even if he were, he certainly did not use it.

Officer Cerami, on the other hand, struck the appellee, after the appellee began grappling with Officer Agen. Cerami, however, did not effect the arrest, nor was he the charging complainant.

Appellee conceded that there was no conspiracy. Therefore, since the officers were sued individually for separate acts, separate findings of compensatory damages should have been made.

B. Damages Limited By Arraignment

It is quite true that in a state action for malicious prosecution, attorney's fees for defense of the criminal charges are awardable. However, such damages are not awardable in an action for false arrest (Broughton v. State, 36 N Y 2d _____ [July 10, 1975]). It is also clear that there is no constitutional right to be free from judicial process, and an alleged malicious prosecution is not a violation of a federal civil right unless it results in a detention (Nesmith v. Alford, 318 F 2d 110 [5th Cir. 1963]; Anthony v. White, 376 F. Supp. 567 [D.C. Del., 1974]).

In Kerr v. City of Chicago, 424 F. 2d 1134 (7th Cir., 1970), cited by appellee, the plaintiff's prosecution did result in a detention of over 18 months. The issue in Kerr was not so much whether attorney's fees were awardable as damages at all in a civil rights action, but whether such expenses were a proper element of damages where the plaintiff, who was only 17, had not personally incurred the expense. The plaintiff's parents had engaged and paid the attorney, but did not join as plaintiffs in the civil rights action.

In the instant case, the prosecution of the appellee did not result in any subsequent arrest or detention, and therefore, the alleged malicious prosecution is not conduct prohibited by section 1983. Damages for attorney's fees and alleged lost wages due to court appearances furthermore, are not awardable in New York State as damages for an alleged false arrest.

> "Where a plaintiff successfully establishes liability for false imprisonment his damages will be measured only to the time of arraignment or indictment, whichever occurs first. Those damages will not include attorney's fees expended in the subsequent defense of the criminal prosecution." (Broughton v. State of New York, 36 N Y 2d _____ [July 10, 1975]).

Arraignment is, moreover, a judicial review of an arrest, and where an individual upon arraignment is further detained, or held on bail or personal recognizance for further proceedings, such action is a magisterial determination that there is probable cause to believe that the individual has committed the offense charged.

Even though the charges against the appellee were ultimately dismissed (an action to which the county district attorney was presumably a party, but to which neither the State nor the University, nor the complaining officer was party, nor even notified or aware of), appellee's being held for further proceedings after arraignment establish that there was probable cause for the arrest.

The defendant, Agen, therefore, established justification for the arrest and the award of damages for false arrest should be reversed.

CONCLUSION

THE JUDGMENT APPEALED FROM SHOULD BE REVERSED

Dated: July 31, 1975

Respectfully submitted,

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MEMORANDUM

by Senator Edwyn E. Mason

AN ACT to amend the criminal procedure law, in relation to the definition of peace officer

This bill is sponsored at the request of the Civil Service Employees Association, Inc.

This measure would amend the new Criminal Procedure Law to provide Peace Officer status for Security Officers, Institution Safety Officers, Supervising Safety Officers, Chief Safety Officers, Campus Security Officers, Campus Security Specialists and Building Guards.

Because of the increasing danger which these employees are subject to, it is imperative that they be given the right to be armed.

No Fiscal Implications.

Exhibit "C"

STATE OF NEW YORK

S. 3380 A. 4290

1975-1976 Regular Sessions

SENATE–ASSEMBLY

February 26, 1975

IN SENATE—Introduced by Sen. MASON—read twice and ordered printed, and when printed to be committed to the Committee on Codes

IN ASSEMBLY—Introduced by Mr. SOLOMON—read once and referred to the Committee on Codes

AN ACT

to amend the criminal procedure law, in relation to the definition of peace officers

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision thirty-three of section 1.20 of the criminal procedure law is hereby amended by adding thereto a new subparagraph, to be subparagraph (y), to read as follows:

(y) Security officer, institution safety officer, supervising safety officer, chief safety officer, campus security officer, campus security specialist and building guard.

§ 2. This act shall take effect on the first day of September next succeeding the date on which it shall have become a law.

EXPLANATION — Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

Clifford J. Arnold,
Plaintiff-Appellee,

-against-

Donald M. Agen & Victor Cerami,
Defendants-Appellants.

STATE OF NEW YORK)
COUNTY OF ALBANY) ss.:
CITY OF ALBANY)

Beverly J. Smith, being duly sworn, says:
I am over eighteen years of age and a typist
in the office of the Attorney General of the State of New York, attorney
for the defendants-appellants herein.

On the 4th day of August 1975 I served
the annexed reply brief for defendants-appellants upon the
attorneys named below, by depositing two copies thereof,
properly enclosed in a sealed, postpaid wrapper, in the letter box
of the Capitol Station post office in the City of Albany, New York,
a depository under the exclusive care and custody of the United States
Post Office Department, directed to the said attorneys at the
addresses within the State respectively theretofore designated by
them for that purpose as follows:

David Gerald Jay, Esq.
1730 Liberty Bank Building
Buffalo, New York 14202

Daniel Lenahan, Esq.
2056 Seneca Street
Buffalo, New York 14210

Beverly J. Smith

Sworn to before me this
4th day of August 1975

Peter J. Dooley
Notary Public
Qualified in Albany Co. # 0996700
My Commission expires 3/30/75